

STIPULATION AND AGREEMENT

This AGREEMENT entered into and made effective on the ___ day of July 2005, between Applicant Dee Deaterly ["Deaterly"] and Beartooth Properties LLC [Beartooth].

RECITALS

WHEREAS, Deaterly has submitted Application for Beneficial Water Use Permit No.43C-30007297; and

WHEREAS, Beartooth has filed objections to the Application; and,

WHEREAS, Deaterly and Beartooth desire to resolve those objections so that Deaterly may proceed with his requested appropriation of water subject to certain conditions relating to the issuance of the permit as set forth herein;

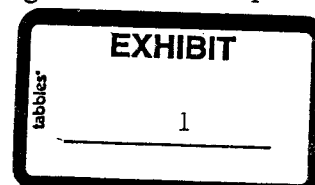
NOW THEREFORE, in consideration of the mutual promises and covenants set forth in this Agreement Deaterly and Beartooth hereby stipulate and agree as follows:

1. Deaterly agrees to install measuring devices at the inlet and outlet of the impoundment that is the subject of the Application to allow for the accurate and timely measurement of the inflow and outflow thereto. While final design is not yet complete, Deaterly's present intention is to install a twelve (12) inch throat-width parshal flume with a staff gauge and rating table both above and below the subject impoundment. Deaterly further agrees to keep records of the rate and volume of water which flows into and out of the impoundment and to provide those records to the Billings Field Office of the Montana Department of Natural Resources and Conservation, and to Beartooth upon its request. For the first year following this Agreement, Deaterly shall take measurements at the inflow and outflow every other day during the period between June 1 and September 1, and once a week during all other times. After the first year following this Agreement, Deaterly shall take measurements once a week during the period between June 1 and September 1, and every other week during the rest of the year.

2. Deaterly agrees to allow Beartooth the right to inspect the impoundment and the inflow and outflow thereto on the following terms and conditions:

a. Beartooth's right of access and inspection provided herein shall only arise when and if the rights to use water evidenced in Beartooth's Statements of Claim No. 43C-197489-00, 43C-197490-00, 43C-197491-00-00, 43C-015686-00, 43C-015687-00 are not being satisfied in full.

b. In such event, and after first providing reasonable telephonic notice to



ORIGINAL

Deaterly or someone at Deaterly's ranch, an officer, agent, or employee of Beartooth shall have the right to enter upon Deaterly's property, and to travel on established roads on Deaterly's property to the location of the impoundment. At the impoundment Beartooth may follow the channel of the watercourse on which the impoundment is located upstream to the location of the spring and measuring device, and downstream to the measuring device and boundary of Deaterly's property. Unless otherwise authorized at the time, any travel off of established roads shall be on foot or by four-wheeler. Within a week of the date Deaterly's Application is approved by DNRC in a form Deaterly shall provide Beartooth with the combination for the electronic gates to get into his property, and shall thereafter notify Beartooth if those combinations are changed.

c. The right of access provided herein shall be for the purpose of inspecting the impoundment and the inflow and outflows only, and may not be used for any other purpose (such as fishing, hunting, etc).

d. The right of access and inspection provided herein may be exercised by Broadwater for a reasonable number of times during each irrigation season, but shall not be abused.

3. In consideration of the above agrees to withdraw its objection to the Application, and further agrees that a beneficial water use permit may issue substantially as set forth in Deaterly's Second Amended Application.

4. Beartooth further consents to Deaterly seeking to further amend the Second Amended Application to include reference to a dry hydrant served from the impoundment to allow the use of water stored therein for fire protection purposes should the need arise.

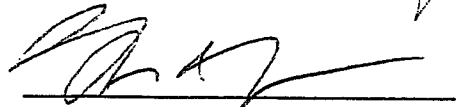
5. The parties agree that the laws of the State of Montana shall govern this agreement and any dispute which may arise under this Agreement.

6. This Agreement is binding on all heirs, lessees, agents, employees, successors, and assigns of the parties hereto, whether such successors or assigns are individuals or other legal entities.

7. This is entered into knowingly and voluntarily and is not the result of any undue or improper influence by any party.


Dee Deaterly, Spring High Ranch

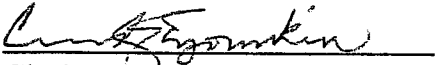
8-17-05
Date


Harley R. Harris
Attorney for Spring High Ranch

8/3/05
Date


Beartooth Properties, Inc. and
John B. Mowell

July 22, 2005
Date


Cindy Younkin
Attorney for Beartooth Properties, LLC and
John B. Mowell

8-1-05
Date

ACCESS AGREEMENT

For the sum of one dollar (\$1.00) and other good and valuable consideration, and upon the terms and conditions set forth below, Dee Deaterly and Spring High Ranch, LLC (Owner) of Stillwater County, Montana, hereby grant to the Absarokee Rural Fire Department (Permittee), the right to enter upon and use the access road, pond, water, and dry hydrant located generally in the NW1/4, NE1/4, SE1/4 of Section 4, Township 6 South, Range 17 East in Stillwater County, Montana.

1. **Purpose.** The purpose of this Agreement is to authorize Permittee to access the pond located on Owner's land in order to make a temporary emergency appropriation from it for purposes of emergency fire control and suppression. In order to facilitate this purpose Owner intends to install and maintain to Permittee's reasonable specifications, a dry hydrant which will allow for the efficient withdrawal of water from the pond. Access to the pond may be accomplished by way of a land-based vehicle or by helicopter.
2. **Terms of Use.** In exercising its rights under this Agreement Permittee agrees that: (a) it will access the pond by way of established roads on Owner's property, or by helicopter; (b) it will accomplish the withdrawal of water by the use of the dry hydrant connection, except that a helicopter may utilize methods of direct withdrawal; (c) it shall to the greatest extent possible utilize the established road and turn-around associated with the dry hydrant; (d) it shall at all times leave a minimum water level of nine (9) feet in the pond; (e) it will attempt to give Owner reasonable notice when Permittee intends to access the pond; (f) water withdrawn from the pond will be used solely for the emergency suppression of an active fire or fires located on or directly threatening lands or structures within a ten (10) mile radius of Owner's property; and (g) its access and use shall be otherwise reasonable under the circumstances.
3. **Termination.** Either party may terminate this agreement, for any reason whatsoever, with 20 days written notice to the other.
4. **Permitted Parties/Assignment.** This Agreement allows the Permittee and any other fire suppression agencies with which Permittee has a mutual aid agreement or arrangement, access to use the pond for a temporary emergency appropriation. Except as expressly provided in this paragraph, neither this Agreement nor any right or duty in whole or in part by the Permittee under this Agreement may be assigned, delegated or subcontracted without written consent of the Owner.
5. **Access Instructions.** On or before May 1 of each year Owner shall provide Permittee with the combination or keys to the gates on Owner's property, and shall

provide Permittee with instructions on how to access the pond and dry hydrant. Permittee agrees to keep all combinations or other access information confidential, and shall only divulge the same to fire fighting personnel on a "need to know" basis.

6. **Indemnification.** The Permittee agrees to save, keep harmless, defend and indemnify the Owner and all its officers, employees and agents, against any and all liability claims, cost of whatever kind and nature, for injury or death of any person or persons, and for loss or damage to any property occurring in connection with or in any incident to or arising out of the occupancy, use service, operation or performance of work in connection with this Agreement or omissions of Permittee's employees, agents or representatives.

7. **Other Uses.** This Agreement does not give the Permittee, its members or agents, any rights to hunting, fishing, hiking or other recreational activities. The Owner grants right to the Permittee to enter the lands under Agreement only for the express purposes stated herein.

8. **Effective Date.** This Agreement is effective on the date of the last signature, below.

Permittee:

Absarokee Rural Fire ^{District} ~~Department~~

By: Kieth E. Mailer
Name

Board Chairman
Title

Kieth E. Mailer
Signature

7/13/06
Date

Owner:

Dee Deaterly and Spring High Ranch

By: Harley R. Harris
Name

Attorney for Dee Deaterly & Spring High Ranch
Title

[Signature]
Signature

6/29/06
Date

STIPULATION AND AGREEMENT

This AGREEMENT entered into and made effective on the ____ day of July 2005, between Applicant Dee Deaterly ["Deaterly"] and Robert K. Broadwater [Broadwater].

RECITALS

WHEREAS, Deaterly has submitted Application for Beneficial Water Use Permit No.43C-30007297; and

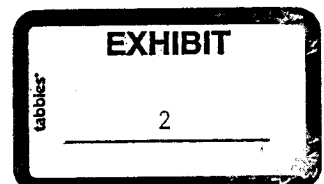
WHEREAS, Broadwater has filed objections to the Application; and,

WHEREAS, Deaterly and Broadwater desire to resolve that objection so that Deaterly may proceed with his requested appropriation of water subject to certain conditions relating to the issuance of the permit as set forth herein;

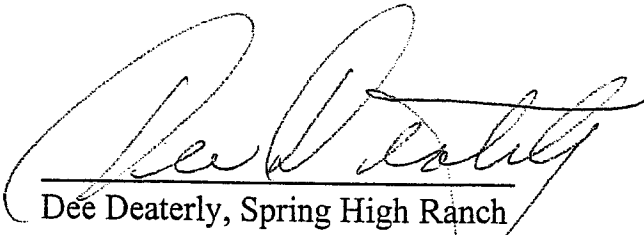
NOW THEREFORE, in consideration of the mutual promises and covenants set forth in this Agreement Deaterly and Broadwater hereby stipulate and agree as follows:

1. Deaterly agrees to install measuring devices at the inlet and outlet of the impoundment that is the subject of the Application to allow for the accurate and timely measurement of the inflow and outflow thereto. While final design is not yet complete, Deaterly's present intention is to install a twelve (12) inch throat-width parshal flume with a staff gauge and rating table both above and below the subject impoundment. Deaterly further agrees to keep records of the rate and volume of water which flows into and out of the impoundment and to provide those records to the Billings Field Office of the Montana Department of Natural Resources and Conservation, and to Broadwater upon its request. For the first year following this Agreement, Deaterly shall take measurements at the inflow and outflow every other day during the period between June 1 and September 1, and once a week during all other times. After the first year following this Agreement, Deaterly shall take measurements once a week during the period between June 1 and September 1, and every other week during the rest of the year.


2. Deaterly agrees to allow Broadwater, or someone designated by Broadwater in writing, the right to inspect the impoundment and the inflow and outflow thereto on the following terms and conditions:



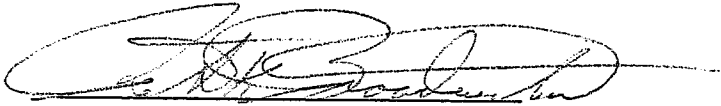
- a. Broadwater's right of access and inspection provided herein shall only arise when and if the rights to use water evidenced in Broadwater's Statement of Claim 43C-45576-00, is not being satisfied in full.
 - b. In such event, and after first providing reasonable telephonic notice to Deaterly or someone at Deaterly's ranch, Broadwater shall have the right to enter upon Deaterly's property, and to travel on established roads on Deaterly's property to the location of the impoundment. At the impoundment Objectors may follow the channel of the watercourse on which the impoundment is located upstream to the location of the spring and measuring device, and downstream to the measuring device and boundary of Deaterly's property. Unless otherwise authorized at the time, any travel off of established roads shall be on foot or four-wheeler.
 - c. The right of access provided herein shall be for the purpose of inspecting the impoundment and the inflow and outflows only, and may not be used for any other purpose (such as fishing, hunting, etc).
 - d. The right of access and inspection provided herein may be exercised by Broadwater for a reasonable number of times during each irrigation season, but shall not be abused.
3. In consideration of the above Broadwater agrees to withdraw his objections to the Application, and further agrees that a beneficial water use permit may issue substantially as set forth in Deaterly's Second Amended Application.
 4. Broadwater further consent to Deaterly seeking to further amend the Second Amended Application to include reference to a dry hydrant served from the impoundment to allow the use of water stored therein for fire protection purposes should the need arise.
 5. The parties agree that the laws of the State of Montana shall govern this agreement and any dispute which may arise under this Agreement.
 6. This Agreement is binding on all heirs, lessees, agents, employees, successors, and assigns of the parties hereto, whether such successors or assigns are individuals or other legal entities.
 7. This is entered into knowingly and voluntarily and is not the result of any undue or improper influence by any party.


Dee Deaterly, Spring High Ranch

8-17-05
Date


Harley R. Harris
Attorney for Spring High Ranch

8/28/05
Date


Robert K. Broadwater

8/4/2005
Date



United States
Department of
Agriculture

Forest
Service

Custer National Forest

Beartooth Ranger District
HC 49, Box 3420
Red Lodge, MT 59068

File Code: 5120

Date: 3/9/2006

Mr. Loyd Weed
Spring High Ranch
Fistail, MT 59028

Dear Mr. Weed

You recently contacted Jeff Stockwell our District Fire Management Officer about the use of a private pond, located at T6S, R17E, NE ¼, NW ¼, SE ¼, Sec 4, for fire suppression access. We feel that with the location of the pond in relation to the National Forest, this would benefit fire suppression operations in the area greatly. We would like, with your permission, to put a Forest Service padlock on the gate for quicker access in the event of a wild fire, this would still leave the existing lock on the gate. We would still contact Mr. Neil Caslin at (406)328-4085, or Mr. Loyd Weed at (941)488-2276 prior to accessing the property.

If you have any questions please feel free to contact Jeff Stockwell or my staff at (406)446-4538.

Sincerely,

/s/ David E. Schmid

DAVID E. SCHMID
District Ranger



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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO. 43C)
30007297 BY DEE DEATERLY) PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on September 20, 2005, in Columbus, Montana, to determine whether a beneficial water use permit should be issued to Dee Deaterly, hereinafter referred to as "Applicant" for the above application under the criteria set forth in Mont. Code Ann. §85-2-311.

APPEARANCES

Applicant appeared at the hearing by and through counsel, Harley R. Harris. Dee Deaterly, and David M. Schmidt, Senior Water Rights Specialist, Water Right Solutions, Inc., testified for the Applicant.

Objector William Morse appeared at the hearing and testified in his own behalf. Donald Hauenstein was called to testify by Objector Morse.

Objector Donald Hauenstein appeared at the hearing and testified in his own behalf.

Keith Kerbel, Regional Manager, Billings Water Resources Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) was called to testify by the Applicant.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered four exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibit Nos. A1-A4.

Applicant's Exhibit A1 is an 11" x 17" map entitled Watershed Basin Map prepared by Water Right Solutions, Inc. The map was prepared May or June 2005.

1 **Applicant's Exhibit A2** consists of one page entitled "Average Annual Flow (Osborn
2 Method) prepared by Mr. Schmidt.

3 **Applicant's Exhibit A3** is a two-page copy of *AVERAGE ANNUAL PRECIPITATION*
4 *MONTANA* based on 1941-1970 base period, prepared by U.S. Department of Agriculture – Soil
5 Conservation Service, Bozeman, Montana.

6 **Applicant's Exhibit A4** consists of a copy of twenty-five pages from the Soil
7 Conservation Service document *EVAPORATION POND DESIGN FOR AGRICULTURAL*
8 *WASTEWATER DISPOSAL*, (February 1974).

9 Objector Morse offered eight exhibits for the record. The Hearing Examiner accepted
10 and admitted into evidence Objector' Morse's Exhibit Nos. OMA-OMH.

11 **Objector's Exhibit OMA** is a copy of a photograph of East Fiddler Creek taken by
12 Objector Morse in August 2001.

13 **Objector's Exhibit OMB** is a copy of a photograph of East Fiddler Creek taken by
14 Objector Morse in August 2001.

15 **Objector's Exhibit OMC** is a copy of a photograph of Objector Morse's upstream
16 headgate on East Fiddler Creek taken by Objector Morse in August 2001.

17 **Objector's Exhibit OMD** is a copy of a photograph of Objector Morse's upstream
18 headgate on East Fiddler Creek taken by Objector Morse in August 2001.

19 **Objector's Exhibit OME** is a copy of a photograph of Objector Morse's upstream
20 headgate on East Fiddler Creek taken by Objector Morse in August 2001.

21 **Objector's Exhibit OMF** is a copy of a photograph of East Fiddler Creek taken by
22 Objector Morse in August 2001.

23 **Objector's Exhibit OMG** is a one-page copy of an affidavit of Rich Ennenga signed
24 April 19, 2002.

25 **Objector's Exhibit OMH** is a one-page copy of an affidavit of Charles R. Mussetter
26 signed April 21, 2002.

27
28 **PRELIMINARY MATTERS**

29 Prior to the hearing the Applicant amended the application by removing the irrigation
30 purpose and associated volume. During the hearing the application was amended further to
31 make all the water in the pond available for a fire protection purpose. No change in the
32 operation of the pond was contemplated with the addition of the fire protection purpose.

1 Prior to the hearing all Objectors other than Objector William Morse and Objector Donald
2 Hauenstein withdrew their objections to this Application. The Environmental Assessment (EA)
3 the Hearing Examiner obtained from the Billings Water Resources Regional Office prior to the
4 hearing was outdated by the Applicant's prehearing amendments to the Application. The
5 Hearing Examiner asked the Billings Water Resources Regional Office to update the EA using
6 the amended Application information, serve copies on the Parties, and send the revised original
7 EA to the Hearing Examiner. The Parties were allowed ten working days after service of the
8 revised EA to lodge objections to all or part of the document. No Party filed objections and the
9 revised EA document was added to the file by the Hearing Examiner.

10 The Hearing Examiner, having reviewed the record in this matter and being fully advised
11 in the premises, does hereby make the following:
12

13 FINDINGS OF FACT

14 General

15 1. Application for Beneficial Water Use Permit 43C 30007297 in the name of and signed by
16 Dee Deaterly was filed with the Department on August 21, 2003. The priority date of the
17 Application was changed to March 12, 2004, which is the date the Applicant provided
18 information to the Department to make the Application correct and complete under Mont. Code
19 Ann. §85-2-302. (Department file)

20 2. The revised EA prepared by the Department for this application on September 21, 2005,
21 was reviewed and is included in the record of this proceeding. (Department file)

22 3. As noticed, the Applicant sought to appropriate 100 gallons per minute (gpm) up to
23 161.30 acre-feet of water per year from an unnamed tributary to the East Fork of Fiddler Creek.
24 The water is to be diverted at a point in the NW¼NE¼SE¼ of Section 04, Township 06 South,
25 Range 17 East, Stillwater County, Montana. The unnamed tributary to East Fork of Fiddler
26 Creek originates from a spring on land owned by the Applicant. The proposed means of
27 diversion is a dam. The proposed use is fish and wildlife up to 111.3 acre-feet in a 9.00 acre-
28 foot capacity onstream reservoir located in the in the NW¼NE¼SE¼; 5 acres of lawn and
29 garden irrigation up to 10 acre-feet in the SE¼NE¼, and 26.4 acres of irrigation up to 40 acre-
30 feet in the S½NE¼, all in Section 04, Township 06 South, Range 17 East, Stillwater County,
31 Montana. The proposed period of diversion and period of use is January 1 to December 31,
32 inclusive, for the fish and wildlife purpose; and April 15 to October 15, inclusive, for the lawn and

1 garden and irrigation purposes. (Department file, amended application filed May 20, 2005,
2 testimony of Dave Schmidt)

3 4. A public notice describing facts pertinent to this application was published in the
4 *Stillwater News*, a newspaper of general circulation on April 29, 2004, and was mailed to
5 persons listed in the Department file on April 24, 2004. (Department file)

6 5. Applicant amended the application on May 20, 2005, as follows: the irrigation purpose
7 and associated volume were removed, and the capacity of the reservoir was increased from 9.0
8 acre-feet to 11.22 acre-feet. During the hearing the application was amended further to make all
9 the water in the pond available for a fire protection purpose. No change in the operation of the
10 pond was contemplated with the addition of the fire protection purpose. The modified application
11 is a subset of the initial application that was described in the public notice. (Department file,
12 testimony of Dave Schmidt)

13 6. As amended, Applicant seeks to appropriate 100 gallons per minute (gpm) up to 11.22
14 acre-feet of water per year from an unnamed tributary to the East Fork of Fiddler Creek. The
15 water is to be diverted at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 04, Township 06 South,
16 Range 17 East, Stillwater County, Montana. The proposed means of diversion is a dam. The
17 proposed use is fish and wildlife, and fire protection in an 11.22 acre-foot onstream reservoir
18 located in the proposed place of use in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 04, Township 06 South,
19 Range 17 East, Stillwater County, Montana. The proposed period of diversion and period of use
20 is January 1 through December 31, inclusive, of each year. (Department file, amended
21 application filed May 20, 2005, testimony of Dave Schmidt)

22 **Physical Availability**

23 7. Applicant measured the flow prior to making the original application for an unknown
24 length of time. Applicant put a pipe in the spring which is the source of the unnamed tributary to
25 the East Fork of Fiddler Creek and measured the flow at 100 gpm. Keith Kerbel, Manager of the
26 Billings Water Resources Regional Office, measured flows immediately upstream of the pond at
27 120 gpm and immediately downstream of the pond at 130 gpm on June 30, 2005. I find that
28 water is physically available. (Department file, testimony of Keith Kerbel)

29 **Legal Availability**

30 8. Applicant analyzed the downstream appropriators' water rights using the Department of
31 Natural Resources and Conservation (DNRC) website. The irrigation season is the time of year
32 when flows are used by downstream senior appropriators. Demands on the source exceed

1 water available during the irrigation season. There are times during the year outside the
2 irrigation season when little use is being made by other appropriators and it is during these
3 times that the pond can be filled. Once the pond is full, Applicant intends to operate the pond so
4 outflows equal inflows, and to make up water which evaporates from the pond surface from
5 another water right from the spring which is the source of the unnamed tributary to the East Fork
6 of Fiddler Creek. Applicant intends to file a Notice of Completion of Ground Water Development
7 for a developed spring pursuant to the permit exception in Mont. Code Ann. §85-2-306 to
8 provide for evaporation from the pond. Water requested outside the irrigation season is legally
9 available. (Department file, testimony of David Schmidt, William Morse)

10 **Adverse Effect**

11 9. Applicant plans to fill the pond outside the irrigation season and operate the pond so
12 outflow equals inflow after the pond is filled. Applicant plans to use a valve installed in the pond
13 outlet to control outflows or stop diverting if a valid call is received from downstream
14 appropriators. The evaporative loss from the pond is estimated at 1.3 gpm by Mr. Schmidt.
15 Applicant intends to file a Notice Of Completion Of Ground Water Development for a developed
16 spring pursuant to the permit exception in Mont. Code Ann. §85-2-306 to provide water to make
17 up for evaporation from the pond. The source on Applicant's property is a gaining source as
18 evidenced by Mr. Kerbel's measured ten (10) gpm gain in flow between locations upstream of
19 the pond and downstream of the pond (See Finding Of Fact No. 7 above). In witness
20 examination regarding seepage losses from the pond, testimony was given that all ponds leak
21 downstream, and any water that may seep from the pond will follow the topography, which in
22 this case is back to the stream. When Applicant's plan (outflow equals inflow, and make-up of
23 evaporative loss from the same source with a permit exception under Mont. Code Ann. §85-2-
24 306) is followed, the effect on prior appropriators during irrigation season at a minimum will
25 equal the evaporative loss from the pond. Testimony of Mr. Schmidt and Mr. Kerbel indicates
26 that the evaporation make-up water is from the same source that would eventually reach
27 downstream prior appropriators. To have no effect on the downstream appropriators, the
28 evaporative loss must come from a non-tributary source. Downstream irrigators have only had
29 high water irrigation water since 1995. Downstream appropriators will be adversely affected in
30 an amount equal to the evaporative loss from the pond. (Department file, testimony of David
31 Schmidt, Keith Kerbel, William Morse, Donald Hauenstein)

1 **Adequacy of Appropriation Works**

2 10. Applicant constructed the pond in the fall of 2002, and it filled during the winter and
3 spring of 2003. There is some downstream leakage from all ponds, and any water that may
4 seep from the pond bottom will follow the topography. However, the pond holds water.
5 (Department file, testimony of Dee Deaterly, David Schmidt, Keith Kerbel)

6 **Beneficial Use**

7 11. Applicant has provided insufficient evidence that the proposed rate and volume of water
8 requested for the fish purpose is the minimum necessary for the intended purpose. Applicant
9 does not know how many fish require this amount of water. Applicant has no plan to stock this
10 pond with any specific number of fish. Applicant provided testimony that the amount of fish that
11 will make use of the pond is limited by the size of the structure, but offered no other evidence
12 that the requested amount of water is necessary for fish. It is not known how many fish the pond
13 is intended to support nor how much water is necessary for the proposed fishery purpose.
14 (Department file, testimony of David Schmidt)

15 12. Applicant has observed wildlife drinking from the pond, but offered no other evidence
16 that the requested amount of water is the minimum amount necessary for wildlife use. Applicant
17 submitted no evidence that Applicant has any control over any wildlife that may use the pond or
18 that the pond is intended to serve any defined population of wildlife. (Department file, testimony
19 of David Schmidt)

20 13. During the hearing Applicant amended the purpose to include fire protection, however
21 Applicant provided no evidence that the amount of water requested is the minimum necessary
22 for the purpose. Applicant has contacted local county authorities; however, no arrangements
23 have been made with government agencies or local fire departments for access to the water for
24 their operations, or for specified amounts of water. In addition, per Mont. Admin. R. 36.12.105,
25 temporary emergency appropriations, such as for fire protection, may be made without prior
26 approval from the Department when the water is stored under another right. (Department file,
27 testimony of David Schmidt)

28 **Possessory Interest**

29 14. Applicant is the owner of the property which has been designated in the Application as
30 the place of use. (Department file)

1 **Water Quality Issues**

2 15. No objections relative to water quality were filed against this application nor were there
3 any objections relative to water classification or to the ability of a discharge permit holder to
4 satisfy effluent limitations of his permit. (Department file.)

5 Based on the foregoing Findings of Fact and the record in this matter, the Hearing
6 Examiner makes the following:

7
8 **CONCLUSIONS OF LAW**

9 1. The Department has jurisdiction to issue a provisional permit for the beneficial use of
10 water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 by a preponderance of
11 the evidence. Mont. Code Ann. §85-2-311(1).

12 2. A permit shall be issued if there is water physically available at the proposed point of
13 diversion in the amount that the applicant seeks to appropriate; water can reasonably be
14 considered legally available during the period in which the applicant seeks to appropriate, and in
15 the amount requested, based on an **analysis** of the evidence on physical water availability and
16 the existing legal demands, including but not limited to a comparison of the physical water
17 supply at the proposed point of diversion with the existing legal demands on the supply of water;
18 the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a
19 state reservation will not be adversely affected based on a consideration of an applicant's **plan**
20 for the exercise of the permit that demonstrates that the applicant's use of the water will be
21 controlled so the water right of a prior appropriator will be satisfied; the proposed means of
22 diversion, construction, and operation of the appropriation works are adequate; the proposed
23 use of water is a beneficial use; the applicant has a possessory interest, or the written consent
24 of the person with the possessory interest, in the property where the water is to be put to
25 beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not
26 be adversely affected, the proposed use will be substantially in accordance with the
27 classification of water, and the ability of a discharge permitholder to satisfy effluent limitations of
28 a permit will not be adversely affected. Mont. Code Ann. §85-2-311 (1) (a) through (h).

29 3. A public notice containing the facts pertinent to the permit application must be published
30 once in a newspaper of general circulation in the area of the source and mailed to certain
31 individuals and entities. Mont. Code Ann. §85-2-307. (See Finding of Fact Nos. 3, 4)

32 Modifications to an application may be considered in a proceeding previously publicly noticed so

1 long as potential objectors are not prejudiced. Modification to an application can cause prejudice
2 in some cases. Lack of complete notice means that persons potentially affected by the
3 modification have been given insufficient information to determine the likelihood of whether they
4 would be adversely affected. See In the Matter of the Application for Beneficial Water Use
5 Permit 76161-s76G by Ed Janney, Proposal for Decision (1992); In the Matter of the Application
6 for Beneficial Water Use Permit No. 24591-g41H by Kenvon-Noble Ready Mix Co., Proposal for
7 Decision (1981).

8 4. Here, the modified application is a subset of the original application. (See Findings of
9 Fact Nos. 3, 5, 6) Therefore, parties to the case are not prejudiced. The modification does not
10 increase the burden on the source beyond that identified in the public notice; therefore, other
11 potential objectors are not prejudiced and the amended application does not have to be re-
12 noticed according to Mont. Code Ann. §85-2-307.

13 5. The Applicant has proven that water is physically available at the proposed point of
14 diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont.
15 Code Ann. §85-2-311(1)(a)(i). See Finding of Fact No. 7.

16 6. The Applicant has proven that water can reasonably be considered legally available
17 when the pond is filled outside the time period within which downstream irrigation rights exist
18 according to the Department Water Right Records. Downstream appropriators would have a
19 legal demand for water during irrigation season. Mont. Code Ann. §85-2-311(1)(a)(ii). See
20 Finding of Fact No. 8.

21 7. The Applicant has not proven by a preponderance of the evidence that the water rights
22 of prior appropriators under existing water rights, certificates, permits, or state reservations will
23 not be adversely affected. The Applicant's plan is to take water from the source, pursuant to an
24 exception under Mont. Code Ann. §85-2-306, to make-up evaporative losses from the pond.
25 The Hearing Examiner recognizes that a person may apply for a permit exception under Mont.
26 Code Ann. §85-2-306. However, acquiring pond evaporation make-up water from a water right
27 from the same source, that is, removing water which would contribute to downstream flows,
28 increases the burden on the source and does not prevent adverse effect on prior downstream
29 appropriators during irrigation season. Mont. Code Ann. §85-2-311(1)(b). See Finding of Fact
30 No. 9.

1 8. The Applicant has proven that the proposed means of diversion, construction, and
2 operation of the appropriation works are adequate. Mont. Code Ann. §85-2-311(1)(c). See
3 Finding of Fact No. 10.

4 9. The Applicant has not proven the proposed fish and wildlife use of water is a beneficial
5 use of water for which Applicant can establish a water right under a permit because the
6 Applicant provided no evidence of a defined population of fish or wildlife which this water is
7 intended to support. The Applicant has not provided evidence to establish a direct correlation
8 between the amount of water applied for and the need for that amount of water to sustain a
9 defined fishery or wildlife population. The Applicant has not proven by a preponderance of
10 evidence that the quantity of the water proposed to be used is the minimum amount necessary
11 for the proposed beneficial use. See In The Matter of Bitterroot River Protective Association v
12 Kenneth R. and Judith A. Siebel and the Montana Department of Natural Resources and
13 Conservation, Cause No. BDV-2002-519, Order On Petition For Judicial Review, Montana First
14 Judicial District Court (2003); Bitterroot River Protective Ass'n. Inc. v. Siebel, 2005 MT 60, 326
15 Mont. 241, 108 P.3d 518. In addition, the Department may not issue a permit for more water
16 than can be beneficially used without waste. See Mont. Code Ann. §85-2-312(1). Waste is the
17 unreasonable loss of water or the application of water to anything but a beneficial use. See
18 Mont. Code Ann. §85-2-102(19). Here, the quantity of water needed for fish and wildlife use was
19 not justified, and there is no evidence to show the amount of water requested is not a waste of
20 water. Mont. Code Ann. §85-2-311(1)(d). See Finding of Fact Nos. 11, 12.

21 10. The Applicant has not proven the proposed fire protection use of water is a beneficial
22 use of water for which Applicant can establish a water right under a permit because the
23 Applicant provided no evidence of a defined volume of water needed for fire suppression which
24 this water is intended to support. The Applicant has not provided evidence to establish a direct
25 correlation between the amount of water applied for and the need for that amount of water to
26 suppress fires. The Applicant has not proven by a preponderance of evidence that the quantity
27 of the water proposed to be used is the minimum amount necessary for the proposed beneficial
28 use. See In The Matter of Bitterroot River Protective Association v Kenneth R. and Judith A.
29 Siebel and the Montana Department of Natural Resources and Conservation, Cause No. BDV-
30 2002-519, Order On Petition For Judicial Review, Montana First Judicial District Court (2003);
31 Bitterroot River Protective Ass'n. Inc. v. Siebel, 2005 MT 60, 326 Mont. 241, 108 P.3d 518. In
32 addition, the Department may not issue a permit for more water than can be beneficially used

1 without waste. See Mont. Code Ann. §85-2-312(1). Waste is the unreasonable loss of water or
2 the application of water to anything but a beneficial use. See Mont. Code Ann. §85-2-102(19).
3 Here, the quantity of water needed for fire protection was not justified, and there is no evidence
4 to show the amount of water requested is not a waste of water. Mont. Code Ann. §85-2-
5 311(1)(d). See Finding of Fact No. 13.

6 11. The Applicant has proven he has possessory interest in the property where water is to
7 be put to beneficial use. Mont. Code Ann. §85-2-311(1)(e). See, Finding of Fact No. 14.

8 12. No objection was raised as to the issue of water quality of a prior appropriator being
9 adversely affected, the proposed use not being in accordance with a classification of water, or
10 as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Therefore,
11 the water quality criteria need not be proven by the Applicant. Mont. Code Ann. §85-2-311(1)(f),
12 (g), (h). See, Finding of Fact No. 15.

13 13. The Department may issue a permit subject to terms, conditions, restrictions, and
14 limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use
15 permit. Applicant has not met the criteria for issuance of a permit when conditions are applied.
16 Mont. Code Ann. §85-2-312. See Conclusions of Law Nos. 7, 9.

17 **WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the
18 Hearing Examiner makes the following:

19
20 **PROPOSED ORDER**

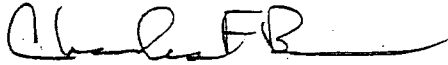
21 Application for Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly is
22 **DENIED.**

23
24 **NOTICE**

25 This Proposal for Decision may be adopted as the Department's final decision unless
26 timely exceptions are filed as described below. Any party adversely affected by this Proposal for
27 Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral
28 argument. Exceptions and briefs, and requests for oral argument must be filed with the
29 Department by **March 7, 2006**, or postmarked by the same date, and copies mailed by that
30 same date to all parties. No new evidence will be considered.

1 No final decision shall be made until after the expiration of the above time period, and
2 due consideration of *timely* oral argument requests, exceptions, and briefs.

3 Dated this 15th day of February 2006.

4 

5 _____
6 Charles F Brasen
7 Hearings Officer
8 Water Resources Division
9 Department of Natural Resources
10 and Conservation
11 PO Box 201601
12 Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 15th day of February 2006 by first class United States mail.

HARLEY HARRIS
PO BOX 1144
HELENA MT 59624

MR DEE DEATERLY
400 SUBSTATION ROAD
VENICE FL 34292

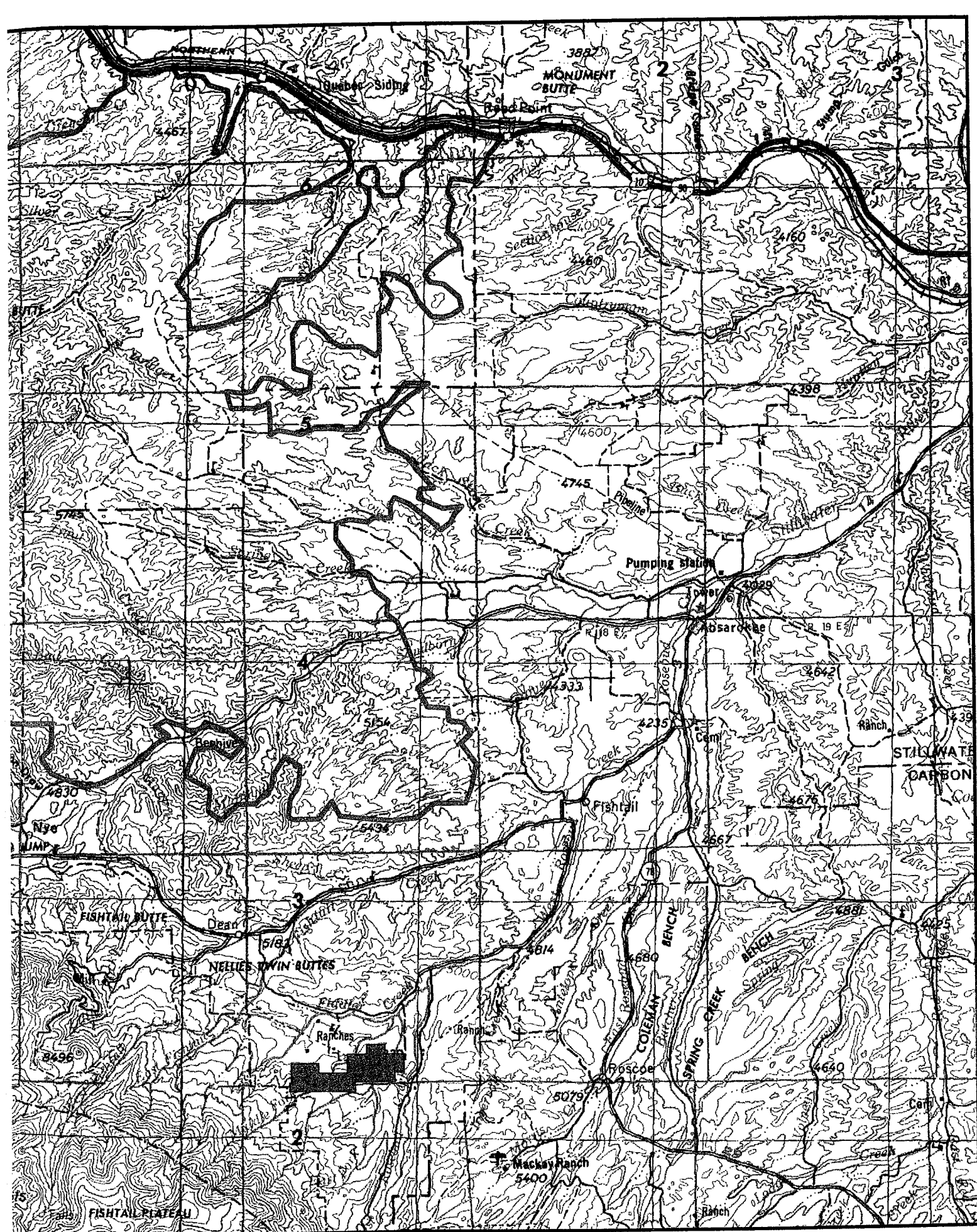
WILLIAM R MORSE
PO BOX 550
ABSAROOKEE MT 59001

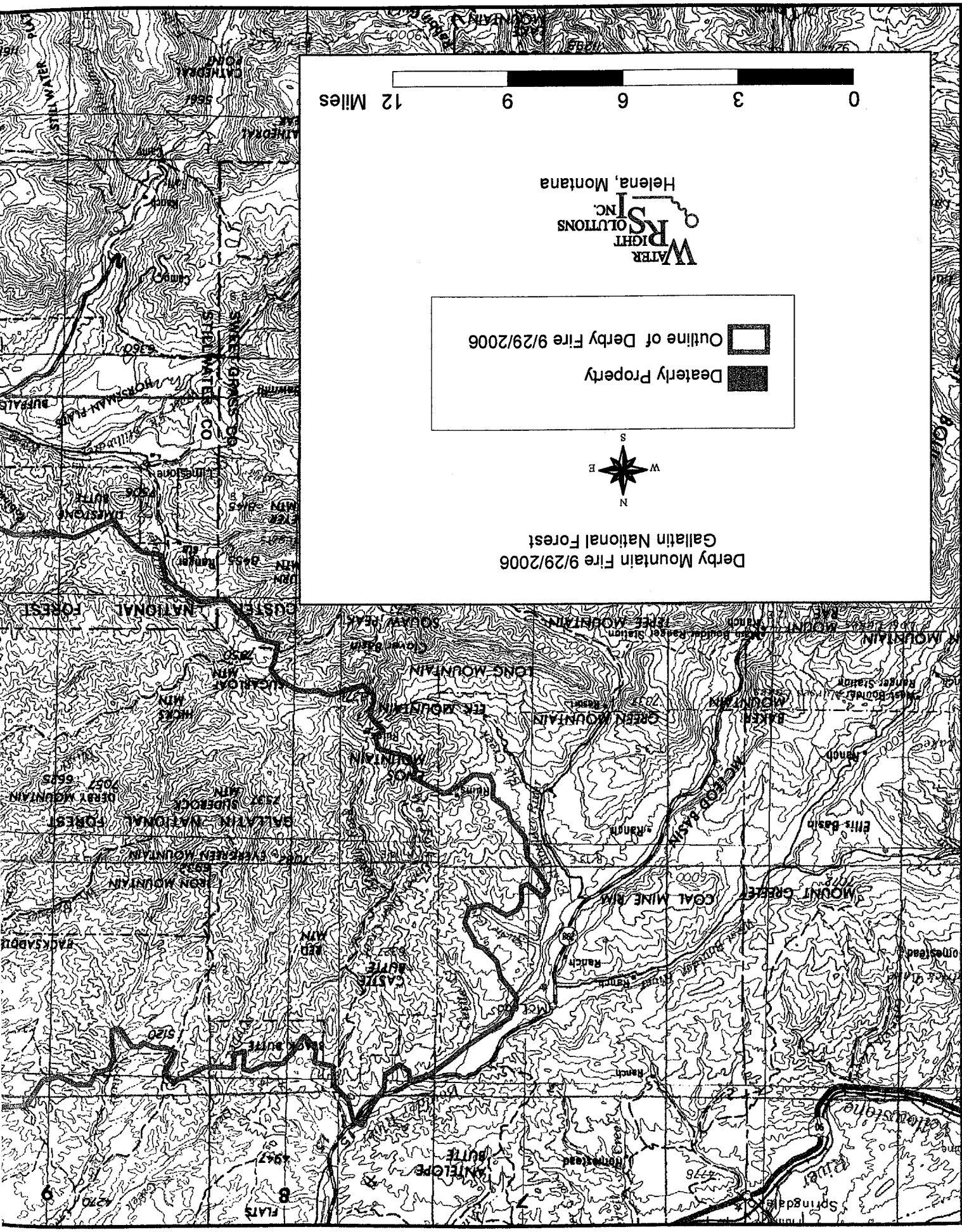
DONALD K HAUENSTEIN
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CC:
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BILLINGS MT 59101

DNRC WATER RESOURCES
BILLINGS REGIONAL OFFICE
AIRPORT BUSINESS PARK
1371 RIMTOP DRIVE
BILLINGS MT 59105-1978


HEARINGS UNIT
406-444-6615





0 3 6 9 12 Miles

WATER
RIGHT
SOLUTIONS
INC.
Helena, Montana

Deaterly Property
Outline of Derby Fire 9/29/2006



Derby Mountain Fire 9/29/2006
Gallatin National Forest